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No. 15-789

IN THE

Supreme Court of the United States

DEBORAH K. JOHNSON, Warden,
Petitioner,

vs.

DONNA KAY LEE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, for federal habeas purposes, California's procedural rule generally barring review of claims that were available but not raised on direct appeal is an "adequate" state-law ground for rejection of a claim.

2. Whether, when a federal habeas petitioner argues that a state procedural default is not an "adequate" state-law ground for rejection of a claim, the burden of persuasion as to adequacy rests on the habeas petitioner (as in the Fifth Circuit) or on the State (as in the Ninth and Tenth Circuits).

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid,

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1. The parties have consented to the filing of this brief.

   Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Court of Appeals for the Ninth Circuit has declared "inadequate" California's rule that claims on the trial record must be raised on appeal or else are defaulted. By brushing aside this rule, which is substantially the same as the rule followed in the federal system and most states, the Ccurt of Appeals has reopened a massive number of defaulted claims in the Nation's largest state, allowing them to be relitigated on federal habeas corpus with all the delay and expense that entails. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Paul Carasi is the co-defendant of habeas petitioner Donna Kay Lee. On Mother's Day 1995, Doris Carasi (Paul Carasi's mother) and Sonia Salinas (mother of Paul Carasi's child) were stabbed to death in the parking garage of Universal Studios CityWalk in Los Angeles. See App. to Pet. for Cert. 138a, 141a-142a (opinion on direct appeal). Paul Carasi and Lee, who was living with Carasi at the time, were tried together for this crime. Carasi was sentenced to death, and Lee was sentenced to life in prison without parole. *Id.*, at 150a.

Lee was appointed counsel for appeal. The Court of Appeal considered five contentions and rejected them in a written opinion. *Id.*, at 137a-162a. The California Supreme Court denied discretionary review on December 13, 2000. *Id.*, at 136a.

Lee filed a petition for federal habeas relief on December 13, 2001. *Id.*, at 79a. After initially denying

a "stay and abey" motion, the District Court granted a second one on December 8, 2003. *Id.*, at 79a.[2]

A month before the latter ruling, Lee filed a state habeas corpus petition. This was denied by the trial court, and successive petitions were denied by the Court of Appeal and the California Supreme Court.[3] All three invoked the rule of *In re Dixon*, 41 Cal. 2d 756, 264 P 2d 513 (1953), that a claim that could have been, but was not, made on direct appeal will generally not be considered on habeas corpus. See App. to Pet. for Cert. 134a-135a (Superior Court); *id.*, at 132a (Court of Appeal); *id.*, at 131a (Supreme Court).

Following the California Supreme Court's denial, Lee filed an amended petition in federal court. See *id.*, at 81a (Magistrate Judge's 2007 Report and Recommendation). The Magistrate Judge found that the claims at issue here were *Dixon*-barred, *id.*, at 100a-101a, that *Dixon* was an adequate and independent state ground, *id.*, at 101a-102a, and that Lee had made no showing of either cause and prejudice or actual innocence. *Id.*, at 103a-104a. The District Court adopted the report and recommendation and denied relief. *Id.*, at 75a-76a. Lee appealed.

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2. It is not clear what, if any, "good cause for the petitioner's failure to exhaust [her] claims first in state court," *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005), existed in this case.

3. In California, there is no appeal from denial of a writ of habeas corpus by the Superior Court, and a successive writ in the Court of Appeal is the normal means of obtaining review. See *Carey* v. *Saffold*, 536 U. S. 214 (2002). Review of the Court of Appeal's decision by the Supreme Court by the normal review procedure is available, however, and it is preferred over a successive writ. *In re Michael E.*, 15 Cal. 3d 183, 193, n. 15, 538 P. 2d 231, 237, n. 14 (1975). *Amicus* CJLF's attempts to reform California habeas procedure have been repeatedly killed in legislative committees upon opposition by the defense bar.

In an unpublished memorandum, the Court of Appeals affirmed as to those issues decided on the merits on direct appeal, applying the 28 U. S. C. § 2254(d) standard. *Id.*, at 72a-74a. However, the Court of Appeals reversed and remanded for a determination of the adequacy of the *Dixon* rule. *Id.*, at 74a.

On remand, with Lee now represented by counsel, *id.*, at 32a-33a, the Magistrate Judge found that the *Dixon* bar was regularly applied and that it was not applied " 'in a surprising or unfair manner.' " *Id.*, at 65a-66a. Further, Lee still made no showing of cause and prejudice or actual innocence, and therefore the claims were barred. *Id.*, at 69a-70a.

Again, the District Court adopted the report and recommendation. *Id.*, at 21a-25a. Again, Lee appealed, and again the Ninth Circuit reversed. *Id.*, at 20a. It remanded the defaulted claims for litigation on the merits. See *ibid.*

SUMMARY OF ARGUMENT

The Ninth Circuit has once again declared a state procedural default rule "inadequate" for a reason that has no basis in the policies behind the "adequate state ground" doctrine. As this Court held quite clearly in *Walker* v. *Martin*, when a claim can be dismissed on multiple grounds, a state court that chooses the most straightforward ground is acting properly. There is no federal policy requiring state courts to always go to the procedural ground first, and federal courts regularly employ a flexible choice of ground approach in analogous situations. Certiorari should be granted to reaffirm that a state rule need be "regularly followed" only in the sense that it is followed regularly enough to give fair notice to litigants.

The Ninth Circuit's needless disregard of a valid state rule is a source of waste and delay. Competent appellate lawyers properly winnow out weak claims to focus on the stronger ones, and federal habeas corpus should be focused on those stronger claims. By effectively repealing the exhaustion rule for claims defaulted on direct appeal, the Ninth Circuit requires the federal district courts in the Nation's largest state to litigate on the merits every claim that an imaginative inmate or lawyer can conjure up that might have been, but was not, raised on appeal. In a world of limited resources, every dollar spent litigating such claims is a dollar that might have been spent on more worthy claims.

In capital cases, it is routine in California for "exhaustion petitions" to include a massive number of claims, most obviously defaulted. The requirement for federal courts to litigate those claims on the merits is a significant contributor to the extreme delay in such cases, in violation of the rights of victims and, some would say, in violation of the rights of the inmates themselves.

If necessary, this case could be resolved summarily. The decision in this case is contrary to clear language in *Walker* v. *Martin*, and the Court need only confirm what should be obvious, *i.e.*, that this language applies across the board to all state procedural default rules.

ARGUMENT

I. The Ninth Circuit continues to declare state rules "inadequate" for reasons with no rational basis in policy.

Over six years ago, *amicus* CJLF noted that the adequate state grounds rule was an untidy area of the law. We urged the Court to expressly abandon the varying rubrics that had been offered throughout the years and frame the rule in a straightforward way that is consistent with the precedents but also makes clear the policy basis of the rule. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, pp. 6-16, http://www.cjlf.org/briefs/Kindler.pdf. The Court declined our invitation based on the unusual nature of the default in the case. See *Beard* v. *Kindler*, 558 U. S. 53, 62-63 (2009).

Walker v. *Martin*, 562 U. S. 307 (2011), involved a more typical subspecies of default and was decided largely along the lines suggested, but unfortunate language from old cases was not expressly repudiated. *Kindler* and *Martin*, fairly read and properly understood, state the reasons for declaring a state procedural rule "inadequate," but some courts of appeals continue to follow their own earlier precedents based on a rigid interpretation of the earlier "firmly established and regularly followed" rubric of *James* v. *Kentucky*, 466 U. S. 341, 348-349 (1984).

The Ninth Circuit in the present case declared California's sensible rule "inadequate" in " 'a perverse way.' " *Kindler*, 558 U. S., at 62 (quoting *Henry* v. *Mississippi*, 379 U. S. 443, 463, n. 3 (1965) (Harlan, J., dissenting)). The rule is deemed inadequate because it is not applied in a way that the federal government has no policy reason whatever for requiring or encouraging. A fair reading of *Martin* would have made this error

clear, but the Court of Appeals chose to read *Martin* in a cramped way so as to make as little change as possible in its own precedents—the very precedents that led that court to the error that this Court unanimously reversed in *Martin* itself.

In a nutshell, habeas petitioner Lee claims that the California Supreme Court, in the process of deciding the "staggering number of habeas petitions" filed directly in that court, see *Martin*, 562 U. S., at 312-313, and n. 2, does not invoke the procedural rule at issue here as often as it might in the petitions it denies. See App. to Pet. for Cert. 55a. At the risk of sounding flippant, one is tempted to ask, "so what?" What conceivable federal interest is there in encouraging state courts to deny habeas corpus claims that are both defaulted and meritless on the ground that they are defaulted rather than on the ground that they are meritless?

The policy behind the "firmly established and regularly followed" requirement is to prevent state courts from forfeiting federal claims with procedural traps that fail to give the defendant fair notice of what he needs to do. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Walker* v. *Martin*, No. 09-996, pp. 16-21, http://www.cjlf.org/briefs/MartinC.pdf. In *James* v. *Kentucky*, 466 U. S., at 344-348, the default was that the defendant requested an "admonition" when he should have requested an "instruction," but the case law on that distinction was so confused that he did not have fair notice as to which would be considered proper on the no-adverse-inference issue until the Kentucky Supreme Court settled the question in his case.

No such trap is present in this case. The California Supreme Court gave criminal defendants very clear notice 62 years ago that they must make on appeal those claims that can be made on the trial record or risk

having those claims barred on habeas corpus. See *In re Dixon*, 41 Cal. 2d 756, 264 P. 2d 513 (1953); see also *United States* v. *Frady*, 456 U. S. 152, 165 (1982) (similar rule in federal cases "long and consistently affirmed").[4] Every competent criminal appellate lawyer knows the rule and knows what he must do on direct appeal to preserve the claim.

The Court of Appeals insists that "we need to know 'the number of times that claims to which the *Dixon* rule could apply were instead rejected on the merits,'" App. to Pet. for Cert. 17a, but completely fails to state any reason in policy or fairness why that should matter. There is simply no federal interest in forcing denials to be on procedural grounds rather than the merits. Both this Court and Congress have decided just the opposite for federal courts in analogous situations.

At one time, this Court followed a strict rule that a state prisoner's habeas petition with an unexhausted claim had to be dismissed as unexhausted no matter how patently meritless it may have been. See *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). Congress took a dim view of the waste of resources that resulted from sending an obviously meritless claim back to the state courts only to return to federal court once again, and it amended the exhaustion rule in the Antiterrorism and

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4. The fact that application of the rule and its exceptions needed some refinement and clarification in 1993, *In re Harris*, 5 Cal. 4th 813, 826, 855 P. 2d 391, 396 (1993), does not mean that it was inadequate for the intervening 40 years. After all, exceptions to procedural default rules have been a work in progress in this Court for a long time. See, *e.g.*, *Martinez* v. *Ryan*, 566 U. S. __, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012) (making "narrow exception" to rule established 20 years earlier). To the extent that Ninth Circuit precedents indicate otherwise, see App. to Pet. for Cert. 15a, they should be expressly disapproved.

Effective Death Penalty Act of 1996. Federal courts are now expressly authorized by statute to look past the procedural irregularity and *deny* an unexhausted meritless claim on the merits, see 28 U. S. C. § 2254(b)(2), even though the bar remains strict as to *granting* claims.

The distinction between overlooking a procedural bar to deny a claim and overlooking such a bar to grant one is an important difference. If some habeas petitioners find their claims barred while others have the bars waived and their claims granted, that is unequal treatment and raises at least a question of whether some kind of invidious discrimination is afoot. See *Martin*, 562 U. S., at 321 (noting discrimination as key concern). On the other hand, if some petitions are denied on the merits and others are denied on procedural default, there has been no unequal treatment, even if the reason for taking a different path to the same result is not always clear. The orders all end with "denied," and that is what really matters.

Other than the now-partially-abrogated *Rose* v *Lundy* rule, only *Teague* v. *Lane*, 489 U. S. 288, 316 (1989), and subject-matter jurisdiction require a strict order of decision. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998). Elsewhere, this Court has repeatedly held that when the moving party must clear multiple hurdles to get relief those hurdles need not be decided in a particular order, and if one is not cleared there is no need to decide the others.

One important factor in deciding which hurdle to examine first is the ease of decision. In *Lambrix* v. *Singletary*, 520 U. S. 518 (1997), the State asserted that the claim was both defaulted and *Teague*-barred. The Court was puzzled as to why the court of appeals went straight to *Teague* without mentioning default.

> "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system. We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were *easily resolvable* against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law. Cf. 28 U. S. C. § 2254(b)(2) (permitting a federal court to deny a habeas petition on the merits notwithstanding the applicant's failure to exhaust state remedies)." *Id.*, at 525 (emphasis added).

The Court has similarly made the order of decision flexible in the areas of qualified immunity and ineffective assistance of counsel, with ease of resolving the case often being the basis of the choice. See *Pearson* v. *Callahan*, 555 U. S. 223, 236-237 (2009); *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984).

The vast majority of habeas corpus petitions are meritless, and a great many are obviously so. That was true six decades ago, see *Brown* v. *Allen*, 344 U. S. 443, 536-537 (1953) (Jackson, J., concurring in the judgment), and it remains true in our time. See N. King, F Cheesman, & B. Ostrom, Habeas Litigation in U. S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996, p. 52 (2007) (grant rate of 0.29% in noncapital cases); V Flango, Habeas Corpus in State in Federal Courts 61 (1994) (pre-AEDPA, few petitions granted in state or federal courts).

Procedural default questions can be complicated, as this Court noted in *Lambrix, supra*. In the case of the

Dixon rule, whether a claim could have been made on the appellate record may present difficulties if the record is supplemented with outside material.[5] Even when the rule clearly applies, the exceptions may present issues of some difficulty. One of the exceptions, for example, is a "new rule of law." See *In re Harris*, 5 Cal. 4th 813, 841, 855 P 2d 391, 407 (1993) (exception to rule against relitigating issue decided on appeal); *id.*, at 825, n. 3, 855 P 2d, at 395 (same exceptions apply to *Dixon* rule). As this Court is well aware from its *Teague* jurisprudence, deciding when a rule is new is not always straightforward. See, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461 (1993) (5-4 decision).

We can expect, then, that it will not be unusual for a habeas corpus petition to present a claim that is probably defaulted but clearly meritless. Does the California Supreme Court violate some basic jurisprudential norm by disposing of the case on the ground that is more "easily resolvable against the habeas petitioner"? Of course not. Is there any reason in federal law, federal policy, or basic justice why such a practice should cause a state's rules to be branded "inadequate"? No, there is not, and *Martin* quite clearly so held. "We see *no reason* to reject California's time bar simply because a court may opt to bypass the *Clark/Robbins* assessment and summarily dismiss a petition on the merits, if that is the easier path." *Martin*, 562 U. S., at 319 (emphasis added).

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5. The Court of Appeals' assertion that "[a] claim is either record-based, or it is not," App. to Pet. for Cert. 11a, is patently untrue. Further, because claims tend to morph as the case proceeds, the point at which a claim becomes a different claim from the one made on appeal may also be obscure. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Berghuis* v. *Thompkins*, No. 08-1470, pp. 7-10, http://www.cjlf.org/briefs/ThompkinsV.pdf.

In a surreal attempt to evade the clear holding of *Martin*, the Court of Appeals goes off on a discourse about whether the *Dixon* rule is a mandatory rule or a discretionary rule. Nothing in this passage of *Martin* says or implies that it is limited to discretionary rules. The discretionary nature of the rule at issue in *Martin* was discussed while rejecting a different attack on the rule, that it was inadequate *because* it was discretionary. Rejecting that hangover from *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), was the main point of *Kindler*, 558 U. S., at 55[6], but *Martin* had some further cleaning up to do. See 562 U. S., at 316-318. The statement quoted above comes in *Martin*'s rejection of the argument that California's timeliness rule was not "regularly followed," a point on which the discretionary/mandatory distinction is irrelevant.

Finally, it is worth noting that the *Martin* Court did *not* think that it needed to know how many petitions that could have been denied under the *Clark/Robbins* rule were instead rejected on the merits. Cf. App. to Pet. for Cert. 17a. It was enough that hundreds of habeas petitions a year *were* rejected on that basis. See 562 U. S., at 318-319. The reason that is enough is obvious when one goes back to the "fair notice" basis of the adequacy rule. A rule is "regularly" applied if it is applied often enough that litigants know it is a serious potential ground for rejecting a claim that has not been properly raised, as opposed to some rarely used relic that gathers dust on a shelf but is dusted off to be applied freakishly and perhaps discriminatorily against a disfavored claim or claimant.

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6. Although *Kindler* does not mention *Sullivan*, it must be regarded as having overruled that case *sub silento*. And good riddance. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, pp. 494-495 (3rd ed. 2012) (criticizing *Sullivan*).

Amicus would prefer that the term "regularly applied" be abandoned altogether, considering how much misunderstanding it has caused. However, *Kindler* and *Martin* both use the term, so if it is to be kept its fair-notice purpose should be made explicit. That badly needed clarification alone is enough reason to grant certiorari in this case. Until the rule and its reason are clarified, some federal courts of appeals will continue to declare state rules inadequate with no rational policy basis for doing so.

II. Failure to respect state default rules causes waste and delay.

By declaring California's *Dixon* rule inadequate, the Ninth Circuit has effectively repealed the exhaustion rule, 28 U. S. C. § 2254(b), for all claims that can be made on the trial record. A criminal defendant can omit a claim from the direct appeal, "exhaust" it in a state habeas petition that will likely be denied under *Dixon*, and then proceed in federal court with a full-blown review of a claim never considered by the state courts. Along with disrespect for the state's judicial process, such a manner of proceeding has adverse practical effects. It wastes resources litigating claims that do not need to be litigated, and it aggravates the problem of delay, which is especially critical in capital cases.

A. Expense.

Not every conceivable challenge to a criminal judgment needs to be litigated. The law of criminal procedure and evidence is complicated enough that a very large number of claims can be conceived. In California capital litigation, an abusive petition that was "well over 500 pages long and by its own count

raise[d] 143 separate claims" was "by no means an isolated phenomenon." *In re Reno*, 55 Cal. 4th 428, 443, 514-515, 283 P 3d 1181, 1195, 1246 (2012). Nor is the number of conceivable claims that may be brought to federal habeas corpus substantially reduced by the federal question requirement. Federal constitutional law has now intruded so pervasively into criminal procedure that "[f]ederalization is usually very easy " M. May, How To Get Ahead In Federalizing 1 (2010), http://capcentral.org/procedures/federalize/docs/federalization_100421.pdf. It does not follow, though, that appellate counsel should load up the direct appeal brief with every conceivable federal claim. Most of these claims have a chance of success somewhere between microscopic and zero.

In *Jones* v. *Barnes*, 463 U. S. 745 (1983), this Court emphatically rejected the notion that effective assistance of counsel requires raising all nonfrivolous issues on appeal. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.*, at 751-752. The word "default" sometimes carries a connotation of a wrongful or at least negligent omission, but the criminal appellate lawyer who raises only a few issues and leaves the rest on the cutting room floor is doing exactly what this Court has said an effective lawyer should do. The issues in a criminal case *should* be winnowed as the case progresses down the line, and the appellate lawyer's decision to omit, and therefore default, the weak claims to focus on the strong ones is the entirely proper first step in the winnowing process.

Federal habeas review of state cases should be even more narrowly focused. It " 'is a guard against extreme malfunctions in the state criminal justice systems,' not

a substitute for ordinary error correction through appeal." *Harrington* v. *Richter*, 562 U. S. 86, 102-103 (2011) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). When a competent lawyer has determined in accordance with *Jones* v. *Barnes* that a claim is one of the weak ones that should be winnowed out, there has been no extreme malfunction. On the rare occasions when counsel incompetently fails to recognize and brief a claim that is contained in the trial record and that does involve an error so egregious as to constitute an extreme malfunction, federal law provides an exception to the procedural default rule. See *Edwards* v. *Carpenter*, 529 U. S. 446, 451 (2000).

When the exhaustion, procedural default, and deference rules are applied correctly as a coherent system, there should be little left to decide when the typical case reaches federal habeas corpus. The claims that counsel did not make on direct appeal (if contained in the record) or on the initial state habeas petition (if not) are defaulted and may not be considered absent "cause and prejudice," with ineffective assistance being one form of cause. The claims that were decided on the merits must be reviewed on the state court record, see *Cullen* v. *Pinholster*, 563 U. S. 170, 181-182 (2011), and denied except in the rare case that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U. S., at 103. The vast majority of claims should therefore be dismissed at the threshold, reserving the drastic remedy of federal collateral attack on a final state judgment for the rare cases of extreme malfunction of the state system.

Declaring a state procedural rule inadequate severely distorts this system. A defendant who believes that the federal courts will be more sympathetic to a claim actually has an incentive to *avoid* getting a state court decision on the merits, exactly the opposite of what the long-standing exhaustion rule seeks to achieve. Further, the federal district court must adjudicate on the merits *every* claim that was defaulted.

Opening the floodgates in this manner is an enormous waste of resources. Years after the trial, the federal district court must address claims that either were properly winnowed out and should not be litigated at all or should have been raised in the initial reviews of the case (direct appeal or initial habeas corpus in the trial court) and decided by courts that were already familiar with the case. In a world of limited resources, every dollar spent on one purpose is a dollar not spent on some other purpose. The federal courts generally, and indigent defense in particular, are chronically underfunded. See, *e.g.*, American Bar Association, Federal Court Funding (updated Sept. 10, 2015), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html. "Those resources are diminished and misspent if there is judicial disregard" for established limits on habeas corpus, including the procedural default rule. *Richter*, 562 U. S., at 91-92.

Is it a wise allocation of the funds in the already-deficient defense pool to adjudicate on the merits in federal court a claim such as Claim 11 in this case, contending that the Constitution of the United States was violated when someone asked a couple of jurors in a restroom which case they were sitting on? See App. to Pet. for Cert. 38a. Is the failure of the state courts to address and correct this supposed error the kind of "extreme malfunction" for which the drastic remedy of

federal collateral attack is made available? Of course not. This is precisely the kind of weak, bordering on frivolous, claim that the effective advocate described in *Jones* v. *Barnes* can and probably should leave on the cutting room floor. Having been abandoned on appeal, it should be permanently out of the case, barred in state court by the *Dixon* rule and barred in federal court by the procedural default rule. Where application of the rule would be unjust, exceptions are available for "cause and prejudice" and "fundamental miscarriage of justice," but Lee does not claim either in this case. See App. to Pet. for Cert. 7a, n. 4. This claim should have been dismissed at the threshold. The funds that have been spent litigating the adequacy of the state ground to date and the funds that will be spent litigating the merits if the Court of Appeals' decision stands would be better spent on more substantial claims, claims that competent counsel have considered substantial enough to assert all the way through the case.

B. Delay.

Although this is not a capital case, the same default rules apply to capital cases, at least for the time being.[7] The one thing that nearly everyone can agree on in capital litigation is that the extreme delay in resolving these cases is a travesty. Congress has decided that unreasonable delay is a violation of the rights of the

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7. Chapter 154 of title 28 has a separate default rule for states certified under it, see 28 U. S. C. § 2264(a), but implementation of that chapter has been blocked by an injunction issued by a court of dubious jurisdiction. See *Habeas Corpus Resource Center* v. *Dept. of Justice*, No. 13-4517, 2014 U. S. Dist. LEXIS 109532 (ND Cal., Aug. 7, 2014), appeal pending, No. 14-16928 (CA9). An *amicus* brief on behalf of Marc Klaas and Edward Hardesty written by CJLF in this case is available at http://www.cjlf.org/briefs/HCRC_9th.2015.Amici.pdf.

victims. See 18 U. S. C. §3771(a)(7), (b)(2)(A). It enacted the habeas chapter of the Antiterrorism and Effective Death Penalty Act of 1996 primarily to reduce that delay, see *Rhines* v. *Weber*, 544 U. S. 269, 276 (2005), though its purpose has been frustrated by massive resistance. See, *e.g.*, *Richter*, 562 U. S., at 92, ("judicial disregard"); *White* v. *Woodall*, 572 U. S. __, 134 S. Ct. 1697, 1701, 188 L. Ed. 2d 698, 703 (2014) ("disregarded the limitations of 28 U. S. C. § 2254(d)"); *White* v. *Wheeler*, 577 U. S. __ (No. 14-1372, Dec. 14, 2015) (slip op., at 8) ("this Court again advises the Court of Appeals" that it is required to obey the law). Some believe that the delay is a violation of the rights of the defendants. See *Valle* v. *Florida*, 564 U. S. __, 132 S. Ct. 1, 180 L. Ed. 2d 940 (2011) (Breyer, J., dissenting from denial of stay). From either viewpoint, delay needs to be reduced.

Cullen v. *Pinholster*, *Harrington* v. *Richter*, and *Walker* v. *Martin*, if properly implemented and not evaded with cramped interpretations, would go a long way to reducing the delay. As described earlier, the vast majority of claims can be and should be dismissed at the threshold of federal habeas corpus. Few claims that state court decisions on the merits are unreasonable even come arguably close to the high bar of *Richter* *Pinholster*, properly understood, requires the §2254(d) issues to be decided on the pleadings and record, eliminating any need for discovery. *Martin*, properly understood, makes nearly all state procedural rules in force today "adequate" as applied in nearly all cases. A caveat is needed for the historically important but now rare-to-nonexistent case of discrimination against federal rights. See *Martin*, 562 U. S., at 321. Another is needed for the " 'limited category' of 'exceptional cases' " described in *Martin*, at 316, n. 4. For the great bulk of cases, though, adequacy of the state

ground should be so clear as to not even be a substantial issue.

Every habeas case should begin with a clearing of the underbrush. Every claim resolved by the state court on the merits in a decision that is either correct or debatable (which will be nearly all of them) should be out of the case. Every claim defaulted in state court should be out unless there is a substantial argument of one of the rare "adequacy" grounds, cause and prejudice, or fundamental miscarriage of justice. That will be most of them. If no claims remain, as should often be the case, the petition may be denied. If a few remain, the case can proceed focused on those few. That is why Congress decided that 450 days is sufficient to resolve a capital habeas case in district court from filing to final decision. See 28 U. S. C. § 2266(b)(1)(A). That kind of timeliness is entirely achievable if the limits on the issues to be litigated are respected and not evaded.

III. The decision in this case could be reversed summarily.

Amicus CJLF would prefer to see this case taken up for full briefing and argument. In that manner, it could be a vehicle for bringing some clarification to an area of law badly in need of it, as our earlier briefs in *Kindler* and *Martin* have explained in some detail.

However, if the Court does not have room on its crowded docket of full-review cases, this case could also be dealt with summarily. No new law needs to be made to reverse the Ninth Circuit's erroneous decision. The law is already stated as plain as day in *Walker* v. *Martin*, 562 U. S., at 319. A state court rule is not inadequate "because a court may opt to bypass [the rule] and summarily dismiss a petition on the merits, if that is the easier path." All that is needed is to confirm

what already should be obvious to all reasonable jurists, that this rule applies across the board to all state procedural default rules, whether they be characterized as "mandatory" or "discretionary." Regularly followed merely means invoked regularly enough to give fair notice. *Bennett* v. *Mueller*, 322 F 3d 573 (CA9 2003), was effectively overruled by *Martin* and should no longer be considered to have any precedential value. California's *Dixon* rule is "adequate" and should be respected in all cases where it has been applied since at least 1953. A *Dixon*-barred claim should be dismissed in federal habeas corpus unless the petitioner can establish cause and prejudice or actual innocence.

All of this is obvious on a fair reading of *Martin*. While error correction may not be a primary function of this Court, an error with such major impact on the adjudication of criminal cases in the Nation's largest state does warrant correction. Further, as rules similar to *Dixon* are common throughout the country, this issue is one of nationwide importance.

CONCLUSION

The petition for a writ of certiorari should be granted. The case should be set for full briefing and argument, or alternatively the Court of Appeals' decision should be summarily reversed and the District Court's decision dismissing claims as *Dixon*-barred should be reinstated.

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Respectfully submitted,

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